Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, As Amended	)	CC Docket No. 96-149

To: The Commission

BELLSOUTH OPPOSITION/COMMENTS

BellSouth Corporation ("BellSouth"), on behalf of its subsidiaries and affiliates, hereby submits these comments in response to petitions for reconsideration of the FCC's *First Report and Order* in CC Docket No. 96-149, FCC 96-489 (released December 24, 1996), *summarized*, 62 Fed. Reg. 2,927 (January 21, 1997) ("*Order*"), *recon. in part*, FCC 97-52 (released February 19, 1997).

I. TIME WARNER'S ASSERTION THAT BOCS MUST PROVIDE VIDEO PROGRAMMING THROUGH A SEPARATE AFFILIATE IS CONTRARY TO STATUTE, LEGISLATIVE HISTORY, AND FCC PRECEDENT

In its petition for reconsideration of the Commission's *Order*, Time Warner Cable ("Time Warner") argues that Section 272 of the Telecommunications Act of 1996[1] requires that Bell operating companies ("BOCs") who provide video programming services do so through a separate affiliate. Specifically, Time Warner asserts that "only the interLATA telecommunications service transmission underlying a BOC's video programming service is to be treated as an Incidental InterLATA Service . . . and not the video programming service itself."[2] Hence, Time Warner believes "the video programming service itself is . . . fully subject to the separate affiliate requirements of Section 272."[3] As shown below, this interpretation flies in the face of statutory interpretation, legislative history, and previous Commission decisions.

---

1 Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) ("1996 Act").

2 Time Warner Petition at 4.

3 *Id.*

Video programming services are not telecommunications services under Section 272 that would require a separate affiliate. In fact, video programming is exempted from the interLATA telecommunications services under Section 272 for which a separate affiliate is required. Specifically, under Section 272(a)(2)(B)(i), a separate affiliate is required only for the origination of interLATA telecommunications services "other than . . . incidental interLATA services described in paragraphs (1), (2), (3), (5), and (6) of Section 271(g)."[4] Section 271(g)(1)(A) defines incidental interLATA services as including "the interLATA provision by a *Bell operating company or its affiliate* . . . of audio programming, video programming, or other programming services to subscribers to such services of such company or affiliate."[5] This language is unambiguous: it specifically allows the *BOC*, not only an affiliate, to provide video programming service. Where the terms of the statute are clear, courts have held that an agency must give effect to those terms.[6] Thus, under the plain terms of the statute, the provision of video programming services by a BOC falls under the category of incidental interLATA services for which a separate affiliate is *not* required under Section 272.

Time Warner argues, however, that Section 271(h) exempts only the telecommunications service transmission component of video programming from the Section 272 separate affiliate requirement, but not the video programming service itself.[7] What Section 271(h) does, however,

---

[4] 47 U.S.C. § 272(a)(2)(B)(i).

[5] 47 U.S.C. § 271(g)(1)(A) (emphasis added); *see also* § 271(g)(1)(B), (C).

[6] Under *Chevron* and its progeny, courts do not defer to agency statutory interpretations where the statute is clear. *See Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984). The video programming service provisions of the 1996 Act *are* clear, and "[t]here is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes." *United States v. American Trucking Ass'ns, Inc.*, 310 U.S. 534, 543 (1940), *quoted in Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982); *see Caminetti v. United States*, 242 U.S. 470, 490 (1917).

[7] Time Warner Petition at 3-4.

is state that the definition of incidental interLATA services under Section 271(g) is to be narrowly construed, and that the interLATA services provided under Section 271(g)(1)(A) "are limited to those interLATA transmissions incidental to the provision *by a Bell operating company or its affiliate* of video, audio, and other programming services."[8] Thus, Section 271(h) specifically states that a BOC may provide video programming services with or without an affiliate, and may provide interLATA transmission services incidental thereto. Time Warner would stand this explicit language on its head, allowing the BOC to provide interLATA transmission but not the video programming to which the transmission is incidental. The fact that interLATA services incidental to the provisioning of video service are excluded from Section 272's separate affiliate requirements does not subject video service to such requirements; indeed, it compels the opposite conclusion — that the BOCs may, with or without an affiliate, provide both video programming and incidental interLATA transmissions. Time Warner's attempt to limit the Section 272(a)(2)(B)(i) exemption solely to the transmission component of video programming must, therefore, fail.

Moreover, the legislative history of the 1996 Act demonstrates that Congress clearly sought to exclude video services from any separate affiliate requirement. For example, the Senate bill (S. 652) included a requirement that a BOC must use a separate affiliate to provide video programming services over a common carrier video platform unless it complied with certain obligations, whereas the House version (H.R. 1555) contained no such restriction.[9] The conference committee appears to have considered the issue and decided against applying the separate affiliate requirement to BOC provision of video services.[10] If Congress had intended a separate affiliate requirement for BOC

---

[8] 47 U.S.C. § 271(h) (emphasis added).

[9] *Compare* S. 652, 104th Cong., 1st Sess., § 203 (1995) *with* H.R. 1555, 104th Cong., 1st Sess. (1995); *see also* S. Rep. No. 23, 104th Cong., 1st Sess., at 23 (1995).

[10] *See* H.R. Conf. Rep. No. 458, 104th Cong., 2d Sess., at 150-53 (1996).

video services, it would have explicitly set forth the requirement in 272(a)(2) in the same way it did for interLATA telecommunications services, manufacturing activities, and interLATA information services.[11] Its failure to do so here is controlling.

Finally, the FCC has previously relied upon Congress' clear silence in the 1996 Act to forego a separate affiliate requirement for open video systems in the *OVS Second Report and Order*.[12] Specifically, the Commission concluded that Section 653 of the 1996 Act was silent as to the need for a separate affiliate for the provision of open video services, and that Congress had expressly directed that Title II requirements not be applied to the establishment and operation of an open video system.[13] In the *Order*, the Commission refined its analysis to conclude that "pursuant to section 272(a)(2)(B)(i), BOCs are not required to provide the interLATA telecommunications transmission incidental to provision of the programming services listed in sections 271(g)(1)(A), (B), and (C) through a section 272 separate affiliate."[14] The Commission made clear that its refinement "is consistent with our determination in [the *OVS Second Report and Order*] that BOCs are not required to provide open video services through a section 272 affiliate."[15] Thus, to conclude that a separate affiliate is required for the provision of video programming services, as suggested by Time Warner, would contravene the Commission's action in the OVS proceeding, as refined in the *Order* on reconsideration. Time Warner's suggestion must, therefore, be rejected.

---

11 *See Haas v. IRS*, 48 F.3d 1153, 1156 (11th Cir. 1995) ("Where Congress knows how to say something but chooses not to, its silence is controlling.").

12 *Implementation of Section 302 of the Telecommunications Act of 1996, Open Video Systems*, CS Docket No. 96-46, *Second Report and Order*, FCC 96-249, at ¶ 249 (released June 3, 1996) ("*OVS Second Report and Order*").

13 *See OVS Second Report and Order* at ¶ 249.

14 *Order* at ¶ 94.

15 *Order* at n.210. The Commission also recognized in the *Order* that it should not require the creation of separate affiliates where Congress did not so authorize. *See Order* at ¶ 96.

II. THE OVERLY RESTRICTIVE INTERPRETATION OF "OPERATE INDEPENDENTLY" URGED BY MCI AND AT&T IS NOT WARRANTED

Section 272(b)(1) requires that a BOC separate affiliate "shall operate independently" from the BOC itself.[16] The Commission has concluded that this section prohibits joint ownership by a BOC and its Section 272 affiliate of transmission, switching, and other facilities used to provide local exchange and exchange access service; joint ownership of the land and buildings where those facilities are located; performance by the Section 272 affiliate of operating, installation, and maintenance functions associated with BOC facilities; and performance by the BOC or its other affiliates of operating, installation, and maintenance functions associated with facilities that the Section 272 affiliate owns or obtains from a third party.[17]

BellSouth believes the Commission's operate independently standard is overly restrictive and should be reconsidered, at a minimum, to permit a BOC *affiliate* (other than the Section 272 long distance affiliate) to perform installation and maintenance functions for both the telephone company and the long distance (interLATA) company. As stated in BellSouth's petition for reconsideration,[18] the language in Section 272(b)(1) requiring a BOC interLATA affiliate to "operate independently" from the BOC does not constitute an invitation to the Commission to engage in structural regulation beyond what Congress has done in the remainder of Section 272(b). If Congress had intended to grant the FCC authority to prescribe regulation, it would have done so explicitly, as it did in Section 273. Accordingly, the Commission went beyond the intended scope of Section 272(b) when it concluded that "the 'operate independently' requirement of section 272(b)(1) imposes requirements beyond those listed in sections 272(b)(2)-(5)."[19]

---

16 47 U.S.C. § 272(b)(1).

17 *Order* at ¶ 158.

18 *See* BellSouth Petition at 4-7.

19 *Order* at ¶ 156.

Nevertheless, AT&T Communications Corp. ("AT&T") and MCI Telecommunications Corporation ("MCI") allege in their petitions that the prohibitions imposed by the Commission in interpreting the operate independently requirement do not go far enough and that they should, in fact, be broadened. For example, AT&T requests that the Commission modify its operate independently standard "so as to clearly prohibit a BOC and its § 272 affiliate from integrating functions such as marketing, sales, advertising, service design and development, product management, facilities planning, and other activities."[20] Similarly, MCI claims that the Commission merely went "through the motions of ordering . . . independent operation" and thus failed to adequately implement Section 272(b)(1).[21] Neither of these parties, however, presents any new facts or grounds upon which the FCC can reexamine its interpretation of the "operate independently" requirement.[22] Accordingly, the Commission should reject these attempts to impermissibly further broaden the scope of Section 272(b)(1), and should instead construe the operate independently requirement more narrowly to permit a BOC affiliate to perform installation and maintenance activities.[23] Allowing BOC affiliates to perform installation and maintenance activities will lead to greater economies of scope, resulting in more expansive and efficient service to consumers.

In addition, as noted in BellSouth's Petition for Reconsideration, the exclusion of all planning, design and development activities from the ambit of "joint marketing" is also clearly over-broad.[24] Although BellSouth agrees that technical network planning, design and development activities could be excluded from "joint marketing" consistent with the non-discrimination network

---

20 AT&T Petition at 3.

21 MCI Petition at 3.

22 *See generally* MCI Petition at 3-10; AT&T Petition at 3-10.

23 *See* BellSouth Petition at 2.

24 *See* BellSouth Petition at 7-10.

change provisions of Section 251,[25] the exclusion of marketing planning, design and development activities, (*e.g.*, design of pricing plans, conducting market research) that do not involve technical network activities, would unfairly prevent BOCs from exercising the same marketing freedom as their competitors. Such an exclusion contradicts the plain intent of Congress,[26] and BellSouth reiterates that the Commission's *Order* should be revised to reflect that marketing planning, design and development activities are a part of "joint marketing."

BellSouth clarifies herein that the term "marketing" is a broad term which may include elements of "sales."[27] Such is the case, for example, with the definition of joint marketing applicable to interexchange carriers ("IXCs") under Section 271(e).[28] However, the terms are not necessarily coextensive, and sale of services may also be separate from marketing; thus, Section 272(g) covers both marketing and sale of services.[29] Under Section 272(g), post-subscription activities, such as explaining how to use a service, providing rate information, and providing dialing instructions, constitute part of an ongoing marketing and sales program. These activities are included in the marketing and sales permitted to the BOCs, even though they may not be included in the FCC's "joint marketing" definition for IXCs under Section 271(e).

Finally, Cox Communications, Inc. ("Cox") argues that existing nonstructural safeguards are insufficient to protect telephone exchange ratepayers and competition.[30] Specifically, Cox claims that price caps and the current affiliate transaction and cost allocation rules fail to adequately protect

---

25 *See* 47 U.S.C. § 251(c)(5).

26 *See* S. Rep. No. 23, 104th Cong., 1st Sess. 23, 43 (1995).

27 *See* BellSouth Petition at 9.

28 *See* 47 U.S.C. § 271(e).

29 *See* 47 U.S.C. § 272(g).

30 *See* Cox Petition at 2-5.

ratepayers from cross-subsidization.[31] Not only are these claims without merit, they are more properly addressed in the Commission's ongoing *Cost Allocation* proceeding in CC Docket No. 96-112.[32] Similarly, while MCI argues that the *Order* fails to impose the reporting requirements necessary to enforce the nondiscrimination requirements of Section 272,[33] BellSouth believes these reporting requirements are unnecessary but in any event should be considered, if at all, in the ongoing *Further Notice of Proposed Rulemaking* phase of this proceeding.

III. CONTRARY TO TELEPORT'S ARGUMENT, BOTH THE 1996 ACT AND THE *ORDER* ALLOW A BOC'S LONG DISTANCE AFFILIATE TO PROVIDE OR RESELL LOCAL EXCHANGE SERVICES

Teleport Communications Group. Inc. ("Teleport") argues that a BOC long distance (Section 272) affiliate should be prohibited from also providing local exchange service.[34] BellSouth disagrees — both the 1996 Act and the Commission's *Order* allow a BOC's long distance affiliate to provide or resell local exchange services, and this position should be affirmed on reconsideration. Specifically, Section 272(a)(1) provides that:

> A Bell operating company (including any affiliate) which is a local exchange carrier that is subject to the requirements of section 251(c) of this title may not provide any service described in [section 272(a)(2)] unless it provides that service through one or more affiliates that . . . are separate from any operating company entity that is subject to the requirements of section 251(c) . . . .[35]

BellSouth agrees with the Commission that "the statutory language is clear on its face" and that "a BOC section 272 affiliate is not precluded under section 272 from providing local exchange service,

---

31 Cox Petition at 4.

32 *See Allocation of Costs Associated with Local Exchange Carrier Provision of Video Programming Services*, CC Docket No. 96-112, *Notice of Proposed Rulemaking*, FCC 96-214 (released May 10, 1996).

33 *See* MCI Petition at 10-13.

34 Teleport Petition at 5.

35 47 U.S.C. § 272(a)(1).

provided that the affiliate does not qualify as an incumbent LEC subject to the requirements of section 251(c)."[36]

BellSouth also agrees that "section 251 does not preclude section 272 affiliates from obtaining resold local exchange service pursuant to section 251(c)(4).[37] Indeed, Section 272(g)(1) explicitly allows the affiliate to "market or sell" the BOC's local exchange service. This provision was explicitly included to permit the BOCs to offer customers "one-stop shopping" after qualifying to enter the interLATA service market through an affiliate.[38] The "sale" of local exchange service clearly includes resale. As Representative Burr stated in connection with the similar "market and sell" language included in Section 601(d) of the 1996 Act (concerning CMRS and wireline service), such language explicitly permits resale.[39] Accordingly, BellSouth urges the Commission to maintain its conclusions regarding the 1996 Act's integrated affiliate provisions and to reject Teleport's arguments to the contrary.

IV. BELLSOUTH SUPPORTS U S WEST'S ARGUMENTS REGARDING OUT-OF-REGION INTERLATA INFORMATION SERVICES AND IXC POST-SUBSCRIPTION MARKETING ACTIVITIES

Finally, BellSouth supports the argument set forth by U S West in its petition for reconsideration that the separate affiliate requirements of Section 272 should *not* apply to the provision of out-of-region interLATA information services.[40] BellSouth also agrees with U S West that, for the reasons stated in its petition, the joint marketing restriction of Section 271(e)(1) *should* apply to IXC post-subscription marketing activities, including the bundling of interLATA and resold

---

36 *See Order* at ¶ 312.

37 *Order* at ¶ 313.

38 *See* S. Rep. No. 23, 104th Cong., 1st Sess. 23, 43 (1995).

39 *See* 141 Cong. Rec. H8456 (daily ed. Aug. 4, 1995) (statement of Rep. Burr).

40 *See* U S West Petition at 1-5.

local exchange services.[41] Accordingly, BellSouth hereby incorporates these arguments by reference and urges the Commission to adopt them.

CONCLUSION

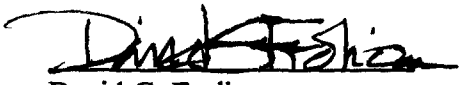
For the foregoing reasons, BellSouth urges the Commission adopt the rules and policies expressed herein.

Respectfully submitted,

BELLSOUTH CORPORATION

By: 

Walter H. Alford
William B. Barfield
Jim O. Llewellyn
1155 Peachtree Street, NE, Suite 1800
Atlanta, GA 30309-2641
(404) 249-4445

By: 

David G. Frolio
1133 21st Street, NW
Washington, DC 20036
(202) 463-4182

Its Attorneys

April 2, 1997

---

41 *See* U S West Petition at 5-7.

CERTIFICATE OF SERVICE

I, Phyllis Martin, hereby certify that copies of the foregoing "BellSouth Opposition/Comments" in response to petitions for reconsideration in CC Docket No. 96-149 were served via U.S. mail on this 2nd day of April 1997, to the persons listed below:

* Chairman Reed E. Hundt
Federal Communications Commission
Room 814
1919 M Street, NW
Washington, DC 20554

* Commissioner James H. Quello
Federal Communications Commission
Room 802
1919 M Street, NW
Washington, DC 20554

* Commissioner Rachelle Chong
Federal Communications Commission
Room 844
1919 M Street, NW
Washington, DC 20554

* Commissioner Susan Ness
Federal Communications Commission
Room 832
1919 M Street, NW
Washington, DC 20554

* Regina Keeney
Chief, Common Carrier Bureau
Federal Communications Commission
1919 M Street, NW Room 500
Washington, DC 20554

* Kathleen Levitz
Deputy Bureau Chief, Common Carrier Bureau
Federal Communications Commission
1919 M Street, NW Room 500
Washington, DC 20554

* A. Richard Metzger, Jr.
Deputy Bureau Chief, Common Carrier Bureau
Federal Communications Commission
1919 M Street, NW Room 500
Washington, DC 20554

* Mary Beth Richards
Deputy Bureau Chief, Common Carrier Bureau
Federal Communications Commission
1919 M Street, NW Room 500
Washington, DC 20554

* Janice Myles
Common Carrier Bureau
Federal Communications Commission
1919 M Street, NW Room 544
Washington, DC 20554

* Melissa Waksman
Attorney, Common Carrier Bureau
Policy & Program Planning Division
Federal Communications Commission
1919 M Street, NW Room 544
Washington, DC 20554

* Radhika Karmarkar
Attorney, Common Carrier Bureau
Policy & Program Planning Division
Federal Communications Commission
1919 M Street, NW Room 544
Washington, DC 20554

Brian Conboy
Sue D. Blumenfeld
Michael G. Jones
Willkie Farr & Gallagher
Three Lafayette Centre
1155 21st Street, N.W.
Washington, DC 20036
Attorneys for Time Warner Cable

Mark C. Rosenblum
Leonard J. Cali
James H. Bolin, Jr.
AT&T Corp.
Room 3247H3
295 North Maple Avenue
Basking Ridge, NJ 07920

Werner K. Hartenberger
Laura H. Phillips
Christina H. Burrow
Dow, Lohnes & Albertson, PLLC
1200 New Hampshire Avenue, N.W.
Suite 800
Washington, DC 20036
Attorneys for Cox Communications, Inc.

Teresa Marrero
Teleport Communications Group, Inc.
One Teleport Drive
Staten Island, NY 10311

Richard A. Karre
U S WEST, Inc.
Suite 700
1020 19th Street, NW
Washington, DC 20036

Frank W. Krough
Mary L. Brown
MCI Telecommunications Corp.
1801 Pennsylvania Ave., N.W.
Washington, DC 20006

Phyllis Martini
Phyllis Martin

* via hand delivery